

IN THE MATTER OF
AMENDMENT GC81 TO THE
MELBOURNE AND PORT PHILLIP
PLANNING SCHEMES

SUPPLEMENTARY SUBMISSIONS TO PART B SUBMISSIONS

INTRODUCTION

1. These supplementary submissions are made on behalf of the Minister for Planning at the close of Stage 1 of the Review Panel hearing. Clarification of the respective roles of the Minister, the Department and the Taskforce is provided in Supplementary Information Note (**SIN**) 1.
2. The Minister confirms his request of the Review Panel to provide advice on the appropriateness of the proposed Amendment. The principal task of the Review Panel is to consider the extent to which the proposed changes to the planning controls allow for the Fishermans Bend Vision, September 2016 to be achieved. The primary strategic tool developed to achieve the Vision is the draft Framework which has in turn been translated into the proposed controls. Hence, the role of the Review Panel is not to review the Vision; it is not to interrogate how the background documents have informed the draft Framework; and it is not to interrogate the draft Framework, except to the extent that the proposed controls have been informed by the draft Framework to achieve the Vision.
3. One important consequence of the confined task given to the Review Panel is that the population target of 80,000 enshrined in the Vision is not open for debate. Not only is the 80,000 target unambiguously embedded in the Vision, it has been in place since 2013.
4. Through evidence and submissions, the Minister has sought to demonstrate that the 80,000 target for residential population is robust and that the core components of the draft Framework which have informed the Amendment are sound. A number of the Minister's witnesses have recommended changes to the Amendment with consequential changes to

the draft Framework. Although the Review Panel has also been asked to consider changes to the draft Framework, the main exercise for the Review Panel is to assess the merits of the Amendment rather than the content of the draft Framework.

5. The Minister welcomes the feedback of the Review Panel in improving the proposed planning controls to achieve the Vision through implementation of the draft Framework. The Part A version of the controls has been tabled but the Minister accepts that there will need to be further adjustments to the planning controls, including corrections to the CCZ Schedules and drafting improvements to the DDO. The Minister asks the Review Panel to consider further revisions to the CCZ Schedules, proposed as Part B.
6. In fulfilling its responsibilities, the Minister respectfully requests the Review Panel to approach its advisory role by taking a long term, precinct wide, ambitious and sophisticated view, recognising the timeframe for delivery of Fishermans Bend, the need for intergenerational equity amongst all landowners, the challenges presented by the unique circumstances of this urban renewal area and the complexity of issues which need to be addressed.

BACKGROUND MATERIAL

7. It is evident that a large volume of work has been undertaken over the preceding 6 years, much of which has been made publicly available prior to and during the Review Panel process.
8. It is important to recognise that the planning and economic considerations which pertained between 2012 and 2016 when the work of the Taskforce began do not necessarily pertain now: the economic environment, the state of the property market, external regulatory settings and the proposed location of a key public transport interchange in Fishermans Bend have all changed, influencing a range of assumptions which informed earlier work.

THE POPULATION TARGET

9. The basis for the population target of 80,000 is addressed in the Minister's Part B submission at [13]-[22].
10. The Minister refers to and relies upon the statements of government policy found in the draft Vision, the Vision and the draft Framework which establish 80,000 residents as the population target.
11. In her evidence, Ms Hodyl referred to previous sensitivity analysis undertaken by Places Victoria which explored different population targets; SIN 2 records that dwelling targets of 15,000, 30,000 and 60,000 were assessed (with corresponding residential population numbers of approximately 35,000, 70,000 and 140,000 respectively) were assessed and a "best for project scenario" of 80,000 residents was determined and subsequently adopted.
12. The methodology for translating the residential target of 80,000 into FAR controls for each precinct has been documented and explained by Ms Hodyl.
13. The distribution of the future population into different household types and different dwelling sizes has also been documented and explained by Ms Hodyl. Further information is provided in SIN 3 provided by the Department, which explains the assumption about the number of 3 bedroom dwellings and the aspiration to provide housing for families with children.
14. In addition to her evidence addressing residential densities in comparable Australian and international locations, additional information from the Department shows that future residential densities exceed current Hoddle Grid densities in all precincts except Wirraway and that future residential densities in all precincts exceed current Southbank and Docklands densities.

15. The Department has also analysed combined residential and commercial CLUE data for Southbank, Docklands, the Hoddle Grid and forecast figures for Arden Macaulay which shows that even the highest existing combined commercial and residential floor area ratios are below the proposed floor area ratios for Lorimer, Sandridge and Montague.
16. Ms Hodyl's addenda 5 includes city clocks in other parts of Melbourne of comparable densities to those proposed in the precincts of Fishermans Bend, which helps to illustrate the intensity of development which is planned for.
17. Fishermans Bend is part of the inner metro region in Plan Melbourne for which a dwelling projection of 215,000 to 230,000 by 2051 is given. Across all of the Melbourne, Port Phillip and Yarra LGAs, a contribution of 1000 dwellings per annum, peaking at 1400 dwellings per annum from Fishermans Bend represents about 20% of the total annual dwelling additions forecast.
18. Having regard to all the information before the Review Panel in relation to the 80,000 target, including statements of government policy, historic data, population forecasts, comparative analysis, market delivery and the overarching vision for Fishermans Bend, it is submitted that the Review Panel must proceed on the basis that FARs based on the 80,000 residential target have a proper strategic basis.

MECHANISM FOR THE DELIVERY OF PUBLIC OPEN SPACE

19. The intended operation of the requirement in clause 4 for the provision of new streets, laneways and open space, and the basis for its validity and appropriateness are addressed in the Minister's Part B submission at [35]-[54].
20. The Minister has obtained and relies upon the opinion of David Batt QC and Marita Foley in relation to clauses 3 and 4 of the CCZ as they relate to the provision for new streets, laneways and public open space. Their opinion concludes that the clauses, properly interpreted:

- (a) are intended to be of substantive effect, requiring that, in order for a planning permit to be granted, the applicant must transfer to the relevant municipal council at no cost such part of its land as is identified in the relevant maps;
 - (b) would not engage the compensation provisions of sections 98(1) or 98(2) of the Act; and
 - (c) would not, by their operation, constitute an unlawful acquisition of property.
21. Their opinion is that the clauses “facilitate land being ceded to the municipal council for the purpose of public open space or roads as part of a *quid pro quo* pursuant to which the permit applicant will obtain the benefits which arise from the grant of a permit”; that “the requirements specified in the relevant provisions and the *quid pro quo* are plainly sufficiently connected with the provisions and objectives of the PE Act and relevant schemes”; and that “the use of the FAR mechanism to secure land required for public open space and roads is not incompatible with, or invalid under, the PE Act.”
22. In relation to local streets depicted in Map 2, the Minister submits that these are properly characterised as streets required as a result of development of a particular site or required to be delivered as local parks in any case. The Minister notes the acceptance by the Councils and Mr Shipp of this proposition. This approach is consistent with established and uncontroversial practice of requiring development to provide land for public benefit as a consequence of development, even where the benefit is enjoyed by a population wider than the users of development itself.
23. However, Fishermans Bend is an instance where “business as usual” or “conventional wisdom” needs to be expanded to embrace the additional challenge of providing open space to an urban renewal precinct in a setting with inadequate provision and elevated land values. This is why the Minister is pursuing a model of requiring provision of open space without prejudicing development outcomes on individual sites. The equitable

treatment afforded by the mandatory FAR as between landowners who are required to provide new streets and open space on their land and landowners who do not is illustrated in Ms Hodyl's statement. Because the calculation of FAR is based on gross development area, development expectations of floor area are set by total land size rather than reduced land size.

24. It is evident from Documents 99 and 138 that land and cash contributions under clause 52.01 at 8% will be insufficient to secure the public open space needs of Fishermans Bend.
25. If new open space is not provided pursuant to clauses 3 and 4, one option would be to increase the public open space levy under clause 52.01 to in excess of 16%. This increases the impost on development without allowing developers the flexibility to achieve higher yield outcomes on sites which are affected by the requirement to provide open space.
26. The Department is undertaking modelling of Ms Thompson's recommendations in terms of its implications for achieving the FAR on all additional parcels of land affected.
27. It is proposed that the landowners who are affected by Ms Thompson's recommendations will be notified in order to provide them with the opportunity to make a late submission in relation to the proposed Amendment and Ms Thompson's recommendations.
28. Although awaiting further input in relation to Ms Thompson's recommendations for new and adjusted open space, it is submitted that linear parks should not be discounted as useable open space. Successful examples are depicted in SIN 4.
29. In terms of the "whole site" acquisitions referred to in Documents 99 and 138, the Minister is entitled to rely on the declaration of Fishermans Bend as a project of State significance to support acquisition and does not require a PAO to effect acquisition.

30. In accordance with the information in document 99, 36% of all private land to be provided for open space will be provided pursuant to the CCZ control and 25% of all open space will be provided using this mechanism. Under document 138, the percentage of all private land for open space rises to 41%.¹

THE OPERATION OF CLAUSE 4

31. Clause 4 of the Schedule to the Capital City Zone seeks to implement four very important measures:
- (a) Establish a mandatory FAR linked to the population target of 80,000;
 - (b) Require the provision of new streets, laneways and public open space by landowners when subdividing their land or seeking permission for buildings and works;
 - (c) Establish an FAU above the mandatory FAR in return for a public benefit, to be agreed by the Responsible Authority and provided;
 - (d) Allow additional floor area in core areas to exceed the FAR if it is not used for a dwelling (for ease of reference, commercial floor space).
32. All four of these measures are very important but from the Minister's perspective can be prioritised in descending order generally as follows:
- (a) Preservation of the integrity of the population target of 80,000, for the purposes of infrastructure planning and precinct character.
 - (b) Provision of open space through an equitable arrangement which does not disadvantage landowners, some of which are required to provide new streets and open space. Making explicit this function of the CCZ Schedule is proposed through an additional Schedule purpose.

¹ It should further be noted that if Ms Thompson's recommendations are accepted and more than 49% of a site area is to be provided as open space, that site area would be acquired by purchase or acquisition rather than via the CCZ controls.

- (c) Provision of public benefits by way of affordable housing, extra open space and community infrastructure. This is the sole mechanism for the delivery of affordable housing, other than a policy direction to provide 6% affordable housing.
 - (d) Incentive for the provision of commercial floor space. This is the sole mechanism for the delivery of commercial floor space, other than guidance to provide a minimum FAR of commercial floor space in the proposed local policy.
33. For core areas, the priority of measures (c) and (d) is reversed.
 34. Because the minimum commercial floor space is not mandated by the control (and instead commercial floor space is an exception to the mandatory FAR in core areas in the control), an unintended consequence of the controls as drafted would allow the FAR to be comprised entirely of residential floor area and no commercial floor area.
 35. The capacity for the controls to operate in this way was highlighted in the cross-examination of Ms Hodyl by submitters before the Panel.
 36. Ms Hodyl's modelling assumed a combination of residential and commercial floor space within the FAR.
 37. The unintended effect of the proposed controls is illustrated in Figures 1 and 2 below, in which residential floor area is shown in blue and commercial floor area is shown in yellow.
 38. The figures use the current proposed FAR in Lorimer and in Montague as an illustration.

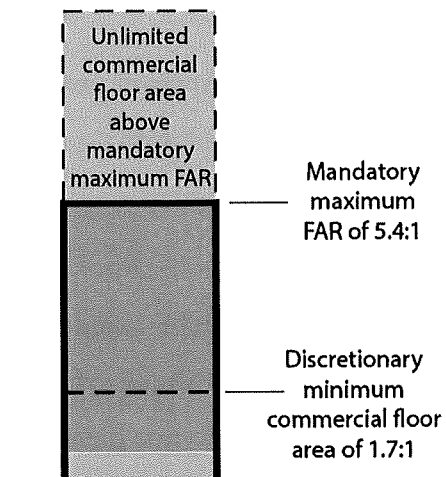


Figure 1. Illustration of Part A/exhibited controls in Lorimer.

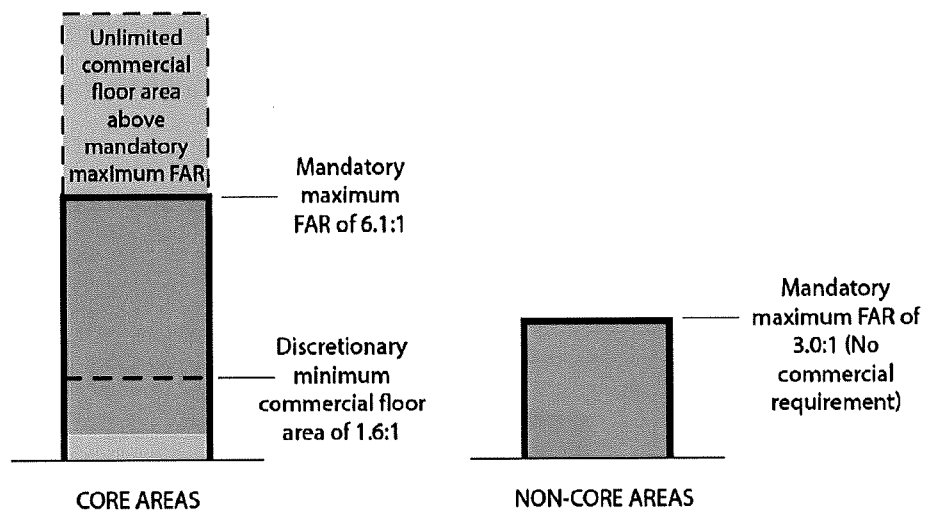


Figure 2 (left): Illustration of Part A/exhibited draft controls in core area in Montague

Figure 2 (right): Illustration of Part A/exhibited controls non-core area in Montague

39. There are two implications which flow from this:
- (a) If the FAR in table 1 to clause 4 is comprised exclusively of residential floor space, the residential population in Fishermans Bend will substantially exceed 80,000.
 - (b) If a landowner is entitled to unlimited commercial floor space above the mandatory floor area ratio, the equity between landowners who have to provide open space and roads, and those who do not, is eroded. That is because landowners who do not have to provide open space and roads on their land will have the opportunity to provide much greater commercial floor area than landowners who do.
40. To address the unintended consequence presented by the operation of CCZ4, p5 and in the absence of a mandatory commercial floor space requirement, an appropriate redrafting of clause 4 and table 1 of the CCZ is to introduce a mandatory residential FAR in addition to the mandatory Total FAR and to delete the allowance to exceed the total floor area ratio with additional commercial floor space in CCZ4, p5. The consequence of this amendment is illustrated below:

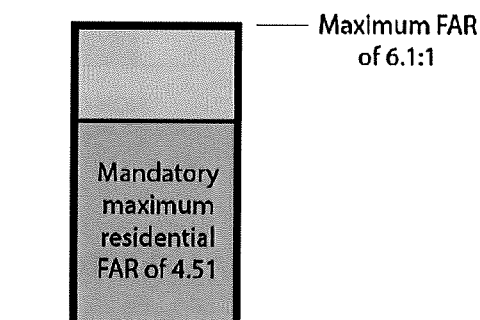


Figure 3: Proposed amended control in core area of Montague

41. This redrafting has the following benefits. It:
 - (a) preserves the integrity of the population target of 80,000.
 - (b) preserves equity as between landowners who are required to provide open space and those who do not.
 - (c) provides an incentive to landowners to provide commercial floor space in order to achieve the permissible FAR on their land. This will operate in tandem with the minimum commercial floor area policy in clause 22.XX.
42. It is noted that Melbourne City Council does not support an allowance to exceed FAR for non-commercial floor space.
43. The Minister acknowledges that while this redrafting achieves the employment targets within the Total FAR and provides an opportunity for landowners to deliver mixed use development with commercial floor space, the incentive to provide more commercial floor space is reduced. The Minister also acknowledges the evidence of Ms Hodyl who supports uncapped commercial floor area above the FAR in both core and non-core areas. To this end, the Minister continues to consider further opportunities to encourage and incentivise additional commercial floor space.
44. In terms of the operation of the proposed Fishermans Bend FAU scheme, the Minister supports the inclusion of a definition of public benefit in the CCZ and accepts the need for additional detail in relation to the equivalence ratio for additional open space and for community infrastructure hubs. The Minister is seeking further feasibility advice to inform the appropriate equivalence ratio, in order to create an incentive to provide additional open space and community hubs at a rate which will return an appropriate value of public benefit to the community. It is the Minister's view that the implications of incorporation of the Guidelines need further consideration.
45. In terms of the operation of the FAU scheme in the Hoddle Grid and Southbank since the introduction of Amendment C270, three permits have been issued since November 2016 where the permit application has sought an FAU by providing commercial floor area as a public benefit. There is

another application (which is presently before VCAT) where the permit applicant has proposed an FAU comprising the provision of office accommodation and a pedestrian link as a public benefit. The limited take up since C270 was gazetted in November 2016 may be a reflection of the high FAR permitted in the Hoddle Grid and Southbank.

46. The Minister acknowledges that the operation of clause 4 will need to be adjusted in relation to buildings and works applications associated with existing uses and is giving consideration to the most appropriate means by which to address this question.

INFRASTRUCTURE PROVISION

47. The question of infrastructure funding is addressed in [11] – [12] of the Minister’s Part B submissions.

Development Contributions Plan

48. The Minister acknowledges the need for the preparation of a Development Contributions Plan (or Infrastructure Contribution Plan, if available)² for Fishermans Bend. The Minister is committed to producing a DCP / ICP in the next 12 – 18 months.
49. The proposed DCP will form part of the broader funding and finance package for Fishermans Bend which is currently under development and which will identify:
- (a) The infrastructure – including strategic infrastructure, such as public transport – required for the successful delivery of Fishermans Bend;
 - (b) Timeframes for the delivery of the infrastructure; and
 - (c) Funding mechanisms for the delivery of the relevant infrastructure.

² The Minister has received advice that the Victorian Planning Authority is currently finalising technical work on the proposed ICP for Strategic Development Areas, which it is expected could apply to Fishermans Bend, and expects to commence targeted consultation shortly.

50. Having acknowledged the desirability of a DCP, the Minister considers that any proposal to defer the consideration of the Amendment until after the preparation of a DCP risks making the perfect the enemy of the good:
- (a) It is a critical point of contrast between Fishermans Bend, on the one hand, and greenfield growth areas and most urban renewal areas, on the other, that Fishermans Bend has already been rezoned to a zoning in which permit applications for (large scale) residential development can lawfully be (and are being) made.
 - (b) Those applications will not cease being made if consideration of the Amendment is deferred while a DCP is being prepared. If anything, the more likely outcome is that there would be a rush of permit applications seeking to 'lock in' the more favourable development parameters of the interim controls and avoid the more onerous infrastructure provision requirements associated with the Amendment.
 - (c) To the extent the evidence of the Councils is that current development contributions and public open space contributions are inadequate to deliver the vision for Fishermans Bend, this situation would not be alleviated by deferring consideration of the Amendment.
51. Accordingly, the Minister submits that, in the particular circumstances of Fishermans Bend, it is appropriate to proceed with consideration (and, if warranted, approval) of the Amendment in the absence of a DCP.

The Public Open Space Contribution and its Operation

52. The Minister notes the submissions from the Councils and the MAC that the POS contribution under clause 52.01 should be increased to 10% (or more). The Minister is open to potentially raising the POS contribution level, but considers that the appropriate juncture to do that is as part of the resolution of the funding and finance package.
53. In relation to the submission that the operation of clause 52.01 should be clarified to make clear that it operates in addition to any requirement for

land to be provided under clause 4 and that cash will be preferred to land, the Minister supports the proposed change.

Quantum and adequacy of Public Open Space

54. The Minister disagrees with Ms Thompson that the proposed 12m wide linear spaces cannot provide a useful open space function, particularly for active recreation. It relies on SIN 4 and the attachment to that SIN which depicts a number of linear parks and how they operate in their context.
55. Nonetheless the Minister welcomes the Panel's consideration of the need to provide additional and reconfigured neighbourhood spaces to achieve Ms Thompson's recommended goal of safe and walkable access to open space within 200m of all dwellings and workplaces.
56. An update of Document 99 has been prepared showing:
- (a) the land affected by Ms Thompson's recommendations;
 - (b) the additional land which will need to be provided;
 - (c) the additional land which will need to be acquired;
 - (d) the total quantum of open space in square metres; and
 - (e) as a percentage of land in the precinct.

Acquisition of land in Fishermans Bend

57. An issue has been raised by Mr Shipp and Mr Milner, among others, as to whether the Amendment needs to include Public Acquisition Overlays ('PAOs') for the purposes of enabling the compulsory acquisition of land.
58. The Minister acknowledges that compulsory acquisition will form a necessary part of delivering the infrastructure for Fishermans Bend, but considers that, as a matter of law, a PAO is not required before acquisition can occur:
- (a) Section 5(1) of the *Land Acquisition and Compensation Act 1986* ('the LACA') provides that an acquiring authority

must not commence to acquire any interest in land under the provisions of the special Act unless the land has been first

reserved by or under a planning instrument for a public purpose.

- (b) 'Planning instrument' is defined in the LACA as a planning scheme made under the *Planning and Environment Act*.³ Where land is subject to a PAO, it is reserved for a public purpose.⁴
- (c) The effect of the declaration of Fishermans Bend as a Project of State Significance, however, is to remove the need for reservation before acquisition:
- (i) Section 201I(1) of the *Planning and Environment Act* provides that the 'Secretary'⁵ may compulsorily acquire for the purposes of a declared project under Pt 9A;
- (ii) Section 201I(3) then provides that the Minister may
- declare specified land required for a declared project to be special project land for the purposes of section 5 of the Land Acquisition and Compensation Act 1986.*
- (d) This cross-reference is picked up in s 5(4B) of the LACA which provides that:
- Subsection (1) does not apply to any land which is special project land under section 201I(3) of the Planning and Environment Act 1987.*
- (e) The overall effect of these provisions is that land declared to be required for the purposes of a declared project under Pt 9A is exempt from the need for reservation under s 5(1) of the LACA.
- (f) This interpretation is expressly confirmed by the Explanatory Memorandum for the Planning and Environment (Amendment) Bill

³ Section 3, *Land Acquisition and Compensation Act 1986*.

⁴ Clause 45.01-6, *Melbourne and Port Phillip Planning Schemes*.

⁵ 'Secretary' is defined in s 3 of the *Planning and Environment Act 1987* in an ambulatory way, such that its meaning varies depending on the identity of the acquiring authority (e.g. a Minister or a council).

1997. The Explanatory Memorandum states that the effect of s 5(4B) is to amend the LACA:

to exempt special project land under proposed section 201I(3) from the requirement to be reserved for public purposes.

59. The use of s 201I(3) enables the adoption of a more flexible approach to the acquisition of land closer to the time at which it is actually required, rather than blighting land through the imposition of a PAO which may not be acted upon for many years or even decades.⁶ This means that, in the event that the land for key infrastructure is not being delivered through the FAR system, the compulsory acquisition process can be commenced promptly.
60. To the extent it is said that the application of a PAO has the beneficial effect of giving notice to landowners that their land may be required in future, the same effect can be achieved by clearly designating land which is potentially required for acquisition in a map within the relevant planning scheme.
61. The notice function of a PAO can also be a double-edged sword for owners of affected land in circumstances where the timing of any acquisition is uncertain. The Advisory Committee in relation to the Punt Road PAO observed:

The Committee is also aware that land within the PAO is predominantly in private ownership and that owners have lived for over 60 years with the uncertainty as to when or if their properties may be required for road widening purposes. The Committee is also acutely aware that this uncertainty is causing significant distress for some residents, with 20 of the 135 directly affected property owners making submissions expressing these concerns to the Committee.⁷

⁶ Cf. the Punt Road PAO which has been in place since 1954.

⁷ Planning Panels Victoria, *Punt Road Public Acquisition Overlay* (30 May 2016), p. 51.

62. In these circumstances, the Minister does not consider that a PAO forms a necessary part of the proposed Amendment.

Affordable housing

63. The Minister's preferred approach to the provision of affordable housing is considered in paragraphs [106] - [113] of the Minister's Part B submission.
64. Further detail on the issue is set out in SIN 8, including a review of recent VCAT and Panel decisions dealing with the provision of affordable housing. The Minister's revised, Part B version of the CCZ also addresses the intention that the public benefit to be secured in return for an FAU will be the provision of 'social housing' as that term is defined in the revised CCZ schedule.

Uplift and Excess Population

65. The Minister acknowledges the concerns expressed by both Councils about the operation of the FAU and the potential for the FAU to deliver a larger population than that contemplated by the draft Framework.
66. The Minister considers this is a relatively unlikely prospect. As drafted, the CCZ:
- (a) Prohibits development with a floor area in excess of that specified for the relevant precinct; but
 - (b) Permits development with a floor area in excess of that specified where:

a public benefit, as calculated and specified in a manner agreed to, and approved by, the responsible authority, is provided, and the permit includes a condition (or conditions) which requires the public benefit to be secured via an agreement made under section 173 of the Planning and Environment Act 1987.

67. The effect of these provisions is that a developer is not, in any sense, 'entitled' to a floor area uplift. Rather, they must enter into an agreement with the relevant responsible authority. In considering whether to enter into the relevant agreement, the Minister considers that it would be open

to the responsible authority to have regard to the effects of agreeing to the proposed FAU including any adverse impacts on infrastructure. To the extent this is not clear, there may be scope of to amend the Guidelines to make this clear.

68. The Minister acknowledges that adopting an uncapped FAU necessitates the monitoring of the number of dwellings delivered in order to ensure that sufficient infrastructure is provided to meet any additional need generated.
69. One option to ensure that this monitoring occurs and that the impacts are considered is that employed for Precinct 15 in Hobsons Bay and endorsed by the Panel for Amendment C88.
 - (a) Precinct 15 is a 67 hectare former industrial site identified for urban renewal and located immediately south of the Westgate Freeway in northern Altona.
 - (b) Amendment C88, prepared by the Victorian Planning Authority, proposed to rezone Precinct 15 from industrial zonings to Comprehensive Development Zone and to insert a Schedule to that Zone giving effect to the Comprehensive Development Plan.
 - (c) Planning for Precinct 15, including infrastructure planning, proceeded on the basis that the Precinct would ultimately house in the order of 7,000 people, equating to around 3,000 dwellings at 2.3 persons per dwelling.⁸
 - (d) To ensure that development was consistent with the planning that had occurred, Amendment C88 proposed to impose what was described a 'soft cap' on development by:
 - (i) Making 'Dwelling' a Section 1 use, subject to a condition that there must be no more than 3,000 dwellings in the 'CDP area';
and

⁸ Victorian Planning Authority, *Altona North Background Report (June 2017)*, Appendix A: Hobsons Bay City Council Vision Document (October 2016), p. 5.

- (ii) Requiring any application that would result in more than 3,000 dwellings in the CDP area to be accompanied by information regarding the impact of the additional development on infrastructure.
- (e) The Panel report on C88 was published on 22 March 2018. The Panel supported the imposition of the soft cap 'as a trigger for further investigation'⁹ of infrastructure needs, although it acknowledged it was an 'imperfect tool'.¹⁰
- (f) By analogy in this case, it might be possible to amend the CCZ control to add a further condition for Dwelling as a Section 1 use so that any development which would result in the number of dwellings in the precinct exceeding that contemplated by the draft Framework (e.g., 5,882 in Lorimer) would require a permit and would need to be accompanied by information regarding the impact on infrastructure.
- (g) All dwellings would count toward this cap, including both affordable and market rate dwellings delivered under the Floor Area Uplift scheme, with the permit requirement for building and works acting as a *de facto* monitoring mechanism to measure progress towards the relevant figure.
- (h) This would mean that there would be an opportunity, well prior to the achievement of the relevant cap, to consider whether or not additional infrastructure was likely to be required and to seek to deliver that infrastructure either in advance of development or contemporaneously with it.

⁹ Planning Panels Victoria, *Hobsons Bay Amendment C88* (22 February 2018), p. 51.

¹⁰ *Ibid*, p. 49.

GOVERNANCE

70. The question of the overall governance framework to be adopted for Fishermans Bend is addressed in [8] – [10] of the Minister’s Part B submissions.

Design Review Panel

71. One issue not addressed in the Part B submission was the issue of the establishment of a Design Review Panel for Fishermans Bend.
72. Both the Ministerial Advisory Committee and the Australian Institute of Architects recommended the establishment of a Design Review Panel to ensure ‘design excellence’ in Fishermans Bend.
73. The Minister refers to and relies upon SIN 12 which identifies only two instances in which planning controls have required matters to be referred to either an expert urban design panel or the Office of the Victorian Government Architect.
74. The Minister also notes that the Office of the Victorian Government Architect has established the Victorian Design Review Panel which is a voluntary ‘advisory service’ aimed at improving design quality. In terms of the kind of projects which may be reviewed by the VDRP, the OVGA advises:

The VDRP reviews projects that are significant because of their site, context or complexity, or because they will be establishing a precedent for new development in that place. The VDRP can review all scales of development from masterplans, major infrastructure, buildings, streets and public spaces. The suitability of projects will be at the OVGA’s discretion.¹¹

¹¹ Office of the Victorian Government Architect, *Victorian Design Review Panel Fact Sheet* (December 2017), p. 1.

75. Accordingly, the Minister accepts that the use of design review panels is not unprecedented in Victoria, but is relatively rare. The Minister looks forward to receiving the Panel's advice on this issue.

ADDRESSING FLOOD RISK

76. The issue of flooding and drainage in Fishermans Bend is addressed in [126] – [133] of the Minister's Part B submissions.
77. While laudable in principle, the approach recommended by the Ramboll Study should not be considered appropriate for incorporation into the draft Framework or the planning controls. The proposal is, to use a phrase used throughout Mr Patterson's evidence 'conceptual'. It requires considerable refinement and modelling (and to have the not insignificant issue of detailed costing addressed) before it could be considered appropriate for implementation.
78. None of the Blue Green Infrastructure initiatives would be precluded by the draft planning control or the draft Framework. Indeed, during his evidence, Mr Patterson supported those elements of the Framework that would encourage innovative design responses, but also favoured retaining design controls to raise habitable floor levels to avoid flooding.¹²
79. Key limitations of the Ramboll Study and the Blue-Green infrastructure approach advocated in it are:
- (a) The approach has not been employed elsewhere in Australia¹³ and it has not been approved by Melbourne Water for Fishermans Bend.¹⁴

¹² See 5.1 of the Framework.

¹³ See [96] – [97] of Mr Patterson's evidence.

¹⁴ Melbourne Water is a determining referral authority for an application for buildings and works within the LSIO (which relates to waterways and open drainage systems and flood plains) and also the SBO (which relates to overland flooding from main drains and local drains).

- (b) The cost of the infrastructure was not one of the criteria against which the infrastructure was assessed in the Ramboll Study.¹⁵
- (c) The areas of public or private land which would be required and encumbered by the “Cloudburst” infrastructure have not been identified, nor how they would be secured. No assessment of the compatibility of “Cloudburst” assets with proposed public open space function had been undertaken.
- (d) Preliminary testing only of available detention areas and levee heights had occurred. Detailed modeling of the concept was beyond the scope of the Ramboll Study and Mr Patterson’s evidence. Mr Patterson accepted that detailed modeling and refinement of the model was required before he would be willing to say the conceptual plan should be implemented as part of the strategy to deal with flooding.
- (e) Management of flood water using the “Cloudburst” infrastructure might allow floor levels in buildings to be lowered. However, whether that would be the case and whether that would sufficiently mitigate the flood risks would depend upon detailed modelling. There was no certainty that increased floor levels would not be required in conjunction with the “Cloudburst” strategies.¹⁶ In his evidence to the Panel, Mr Patterson supported a position where strong encouragement for creative and integrated solutions to address flooding. But the solution should retain the ability to raise floor levels as part of that package if required to address flood risk if required.

¹⁵ See [107] – [116] of Mr Patterson’s evidence.

¹⁶ See [100] of Mr Patterson’s evidence.

THE RELEVANCE OF EXISTING PERMITS AND THE 'CALL IN'

Existing Permits

80. Since the rezoning of the Fishermans Bend in July 2012, 23 permits have been granted for development within Fishermans Bend. Details of these permits, including expiry dates, are set out in Appendix C to the Minister's Part A submission.
81. The Minister's intention is that, if a permit holder seeks an extension of time to act on an existing permit, that application should be dealt with in the ordinary way, in accordance with the principles established by the Supreme Court in *Kantor v Murrindindi Shire Council*¹⁷ and as added to by the Tribunal in decisions such as *AMV Homes Pty Ltd v Moreland CC*.¹⁸
82. Both *Kantor* and *AMV Homes* establish that a change in the planning framework is a matter that will need to be considered in determining whether to extend a permit, but a change in the framework will not necessarily result in refusal. The Minister considers that it is appropriate that each application be considered on its merits.

The Called In Applications

83. The Minister respectfully submits that the called-in applications are not relevant to the Review Panel's deliberation.
84. Clause 3 of the Terms of Reference identifies the purpose of the Review Panel as being to 'advise the Minister for Planning on the appropriateness of the proposed planning scheme amendment GC81.'
85. Ministerial Direction No. 11 and Planning Practice Note 46, entitled *Strategic Assessment Guidelines for preparing and evaluating planning*

¹⁷ (1997) 18 AATR 285.

¹⁸ (Red Dot) [2015] VCAT 1699.

scheme amendment, provide a framework for the evaluation of proposed planning scheme amendments.

86. Significantly, while these documents identify a wide range of matters to be considered in the evaluation of a planning scheme amendment, the consequences of that amendment for existing permit applications is not such a matter.
87. Further, while s 12(2) of the *Planning and Environment Act* requires the consideration of the 'economic effects' of a proposed planning scheme amendment, this has been understood as being directed to the broad economic effects of the amendment, rather than its impact on the private interests of landowners and developers.¹⁹
88. As such, it is respectfully that consideration of the merits of individual permit applications is neither authorised by the Terms of Reference nor necessary to discharge the Panel's task.
89. In any event, the Minister submits that, under the Victorian planning system, the merits of a proposal are ultimately inseparable from the planning framework against which it falls to be evaluated.
90. As such, it cannot be said that a proposal will in some way 'objectively' produce a net community benefit.
91. Rather, any conclusions about net community benefit have to be drawn from the way the proposal responds to the planning framework as it exists at a particular time.
92. The result is that, even if it could be demonstrated that a particular proposal might have been approved under the previous interim controls, this does not establish that the proposal should still be approved under the Amendment or that the Amendment is in some way flawed.

¹⁹ See *Dustday Investments Pty Ltd v Minister for Planning* [2015] VSC 101, [43].

PRECINCT PLANNING

93. One of the next steps in the delivery of Fishermans Bend will be the preparation of precinct plans for each of the precincts. The role of precinct plans, what they will contain and how they will be prepared are addressed in SIN 11.
94. The called in permit applications will be considered following introduction of the proposed controls under consideration by the Review Panel and it is not intended that their assessment will await preparation of the precinct plans.

CONCLUSION IN RELATION TO PART B

95. In accordance with the Review Panel directions, the Minister intends to provide specific submissions during the course of the concurrent hearings and final closing submission at the conclusion of Stage 2 to address issues arising from evidence not yet circulated and submissions not yet tabled. As appropriate, the Minister will table further information and material to assist the Review Panel in meeting its Terms of Reference.

Susan Brennan
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Instructed by Harwood Andrews

28 March 2018

